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No. 03-1050

Supreme Court, U.S.
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In The
Supreme Court of the United States

GREEN LEAF NURSERY, INC. and GEORGE A. PENA,

Petitioners,

v.

E.I. DU PONT DE NEMOURS AND COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, the Petitioners, Green Leaf Nursery, Inc. and George A. Pena, respectfully submit this Reply to Respondent's Brief in Opposition ["Op. Cert."].

ARGUMENT

1. In regard to Petitioners' state common law tort claims, Respondent naturally seeks to characterize the court of appeals' ruling as being consistent with Florida's choice of law principles and this Court's command in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), that federal courts defer to the conflicts rules of the forum. Regrettably, the decision below is not consonant with these directives.

As already discussed in the Petition, see Pet. 7-14, the court of appeals was faced with the choice of applying Florida's generic interest balancing test with a more specific rule, derived from the RESTATEMENT (SECOND) OF CONFLICTS (1971), that "the effect of misrepresentation, duress, undue influence and mistake upon a contract is determined by the law" "chosen by the parties to govern their contractual rights and duties." Id. §§ 187(1) & 201. Despite Respondent's assertions, this provision has been found by Florida courts to apply not only to contractual remedies of rescission, but also any corollary tort remedies arising from a misrepresentation in the formation of a contract, including fraud in the inducement. See *Mazzoni Farms, Inc. v. E.I. du Pont De Nemours & Co.*, 761 So. 2d 306, 311 (Fla. 2000); see also Fla. Stat. § 671.105(1) (1999) ("[W]hen a transaction bears a reasonable relation to this

state and also to another state or nation, the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.").

To the extent that this issue remains open in Florida law (which Respondent appears to concede, see Op. Cert. 4-5, 14, as did the district court below, see Pet. App. 83a-84a), the proper course for the court of appeals was to again certify the issue to the Florida Supreme Court, and not to willy-nilly prescribe its own choice of law *diktat*. Respondent's repeated justification for the court of appeals' holding – that there is some ostensible distinction between rulings that go to a choice-of-law clause's validity, as distinct from its scope – cannot withstand serious scrutiny. The issue here is whether Delaware law, not Florida law, prescribed the underlying elements for the plaintiffs' common law tort actions. The CONFLICTS RESTATEMENT and Florida's own statutory choice-of-law direction confirm such a result. When plaintiffs selected Florida law as the basis of their state common law claims, that included Florida's conflicts principles, which, in this instance would refer-back (*renvoi*) to the law selected by the parties.

The fundamental failing of the decision below is the lack of solicitude it shows to Florida's own statutory and judge-made conflicts rules that would extend greater deference to the parties' choices and to the application of another jurisdiction's substantive tort law to an action pending in the forum. *Klaxon*'s crucial insight – so often ignored – is that states should make their own conflicts rules, in preference to the tendency of federal courts to fashion a homogenous rule of interest balancing in which the forum's law always prevails.

2. Appearing to recognize that Petitioners have raised significant issues as to the proper construction of the "by reason of" language of the civil RICO statute, 18 U.S.C. § 1964(c), and the application of this Court's proximate cause analysis in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), Respondent is reduced to disclaiming the severity of the conflict in the circuits and to make a half-hearted attempt to harmonize these discordant authorities in a way that purports to justify the decision below.

a. The court of appeals rejected plaintiffs' obstruction of justice and witness tampering claims, holding that they failed to satisfy a direct injury based on Respondent's conduct, within the ambit of the Court's decision in *Holmes*, see Pet. App. 25a-28a; plaintiffs' mail and wire fraud claims were denied based on a lack of reasonable reliance on du Pont's representations, thus falling outside the causation requirement of section 1964(c); see Pet. App. 24a-25a. Both these rulings implicate key aspects of litigating civil RICO claims. Both are the subject of substantially different treatment and approaches among the circuits. In both instances, the stringent standard of causation selected by the court below effectively scuttled the claims; Petitioners' case could have proceeded had the court used a more gracious standard of causation. For these reasons, this Petition presents an ideal vehicle for resolving these issues, superior to those cases which this Court has recently considered and rejected.

b. Respondent's glib assertion that there is no real circuit split on what has come to be called the "convergence" rule for *Holmes*'s direct injury inquiry – a requirement that between the party to whom a misrepresentation is made and the victim from whom property is

obtained, there be a direct link – is belied by the courts of appeals' own rulings. Compare *Mylan Laboratories, Inc. v. Matkari*, 7 F.3d 1130, 1137 (4th Cir. 1993), cert. denied sub nom. *American Home Products Corp. v. Mylan Laboratories, Inc.*, 510 U.S. 1197 (1994); *Johnson Enterprises of Jacksonville, Ind. v. FPL Group, Inc.*, 162 F.3d 1290, 1318 (11th Cir. 1998) (requiring convergence in civil RICO cases); with *Monterey Plaza Hotel Ltd. Partnership v. Local 483, Hotel and Restaurant Employees Union*, 215 F.3d 923, 926 (9th Cir. 2002); *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 565 (5th Cir. 2001); *Bieter Co. v. Blomquist*, 987 F.2d 1319, 1325 n.4 (8th Cir.), cert. denied, 510 U.S. 823 (1993) (rejecting convergence).[1]

No matter how Respondent chooses to characterize it, the convergence rule – whatever form it is articulated in or how it is applied – is effectively a bar on civil RICO reaching third-party frauds and misrepresentations. Although the convergence rule is analytically distinct from the requirement of reasonable reliance (more on which presently), it operates to vastly constrict the scope of civil

[1] See also *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 521 (3d Cir. 1998); *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257 (7th Cir. 1995); *BCCI Holdings (Luxemburg), S.A. v. Khalil*, 214 F.3d 168, 173-74 (D.C. Cir. 2000) (all rejecting convergence). Even two of the circuits that require reasonable reliance on a misrepresentation, the Second and the Fourth Circuits, permit a civil RICO fraud case where a third party, rather than the injured victim, relied on the defendants' fraud. See, e.g., *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 384 (2d Cir. 2001) ("a plaintiff has standing where the plaintiff is the direct target of the RICO violation."); *Mid Atlantic Telecom., Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 264 (4th Cir. 1994) (defendant's fraud to customers may have proximately injured plaintiff-competitor).

RICO proceedings in a way not intended by Congress, nor by this Court insofar as *Holmes*'s proximate causation is concerned. Even under Respondent's crabbed reading of the cases, two circuits require convergence in civil RICO cases, while six reject it.

c. If anything, the split in the circuits is even more notorious as to whether there should be a requirement of reasonable reliance on misrepresentations, in order to fall within the causation language of section 1964(c). Despite du Pont's protestations, this split is hardly of Petitioners' imagination; it has been acknowledged in courts of appeals opinions. See *Systems Management, Inc. v. Loiselle*, 303 F.3d 100, 103-04 & n.3 (1st Cir. 2002) ("It is true that at common law a civil action for fraud ordinarily requires proof that the defrauded plaintiff relied upon the deception, and some courts have imported this requirement into RICO actions where the predicate acts comprise mail or wire fraud. But RICO bases its own brand of civil liability simply on the commission of specified criminal acts – here, criminal fraud – so long as they comprise a 'pattern of racketeering activity' and criminal fraud under the federal statute does not require 'reliance' by anyone: it is enough that the defendant sought to deceive, whether or not he succeeded.") (collecting cases documenting circuit split). At last count, four circuits (the Second, Fourth, Sixth, and Eleventh) require reasonable reliance, and five (the First, Third, Fifth, Eight and Ninth) do not.[2] Indeed, the split may be broader and deeper than

[2] Petitioner earlier documented the rejection of reasonable reliance by the First, Third and Fifth Circuits. Pet. 22-23. The Eighth and Ninth Circuits are also on record in opposition. See *United Healthcare Corp. v.*

(Continued on following page)

first supposed, when one takes into account those cases that tend to merge reasonable reliance and convergence idioms. See, e.g., *Cement Contractors Workers District Council Welfare Fund v. Lollo*, 148 F.3d 194, 196 (2d Cir. 1998); *Mid Atlantic Telecom., Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 263-64 (4th Cir. 1994).

Respondent attempts to harmonize this divergent authority – to knit a whole cloth of fabric from these colored skeins of case law – by suggesting, Op. Cert. 27-28, that they are just different points along a continuum of proximate cause. Even with such skillful weaving, alas, the result is more a crazy quilt than an argyle sweater. Respondent argues that two rules are subliminally at work in these cases: one for instances where the misrepresentation was made to the victim-party, and where they are made to a third-party. Regrettably, the cases relied upon by Respondent do not support this factual nuance. Courts of appeals embracing the reasonable reliance rule have applied it indiscriminately to both factual situations.

Respondent's creative harmonization of civil RICO causation doctrine also points to a distinctive feature of this case, and grounds that should counsel the Court to grant review here. It is precisely the combination of the convergence and reasonable reliance theories which acts to

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Am. Trade Ins. Co., 88 F.3d 563, 571 n.5 (8th Cir. 1996) ("[I]t is well settled that such a showing [of detrimental reliance] is not required to prove mail or wire fraud."); *Wilcox v. First Interstate Bank of Or.*, 815 F.2d 522, 531 n.7 (9th Cir. 1987) ("the elements necessary to support damages under civil RICO are different from . . . common law fraud. The difference is that 'justifiable reliance is not an element that need be proven to establish a mail fraud violation'.") (quoting *Armco Indus. Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 482 (5th Cir. 1986)).

bar a wide class of cases that neither Congress (in legislating the "by reason of" language of section 1964(c)) nor this Court (in *Holmes*) intended to categorically prohibit. Taken individually, neither theory works to exclude a large group of third-party frauds and misrepresentations from the ambit of civil RICO. But when used together, the result is awesomely broad. To suggest, as Respondent appears to, that the reasonable reliance requirement is somehow softened by normal proximate cause considerations, ignores the court of appeals' use of convergence as a ground to bar third-party claims altogether. Both issues are perfectly framed in this case. The split in the circuits on this complex of causation issues in civil RICO is growing, and not diminishing. Any hopes that this division would fade as courts proceeded to elaborate causation standards have proven illusory. It requires this Court's intervention to elucidate the *Holmes*' proximate causation analysis in regard to the convergence and reasonable reliance bars on civil RICO actions raising fraud and misrepresentation claims.

CONCLUSION

For the foregoing reasons, along with those earlier presented, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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